Supreme Court, U.S.
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No. 97-318

In The

Supreme Court of the United States

October Term, 1997

MARY AMANDA WEST, a Minor Child, by and through her Parent and Next Friend, Rita Norris,

Petitioner,

v.

JAMES BRADLEY WAYMIRE, individually and in his capacity as an officer of the Frankton Police Department, the CITY OF FRANKTON, and the FRANKTON POLICE DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

Petitioner Amanda West ("Amanda"), by counsel, submits this reply in support of her petition for writ of certiorari in order to respond to misstatements and analytical deficiencies in the brief in opposition of the Town of Frankton (the "Town"). The Town does not dispute that Amanda was sexually molested on multiple occasions by Officer Waymire while he was on duty, armed and in uniform, at a time when she was twelve and thirteen years old. Nor does the Town contest the record of a longstanding policy of tolerance regarding sexual misconduct by police officers, including an unwritten rule that sexual relations in the police station itself would result only in a reprimand the first time an officer was caught. The Town does not deny that it failed to provide any training or establish any procedures regarding the handling of juvenile females taken into police custody, that the Town had a history of protecting officers against complaints of misconduct, and that the Town condoned an atmosphere of sexual abandon on the part of its officers.

Most notably, the Town makes no attempt to contradict the showing that it failed to take corrective action despite actual notice of Officer Waymire's sexual overtures towards a woman and her thirteen-year-old daughter. It is undisputed that the Town deviated from standard procedure by not referring the matter to an independent agency, assured the investigating officer that Officer Waymire would not be fired, notified Officer Waymire of a scheduled interrogation of the complainant so he could confront her beforehand, conducted the investigation through a Town Board member who was also Officer Waymire's cousin, dropped the matter ostensibly because there was no written complaint even though the complainant was not told one was necessary or invited to file one, and did nothing in response to a Town Board meeting in which Officer Waymire admitted there were rumors he was "messing around with thirteen-year-old girls."

Notwithstanding that uncontradicted record, the Town accuses Amanda of misstating the facts and insists that it is entitled to judgment as a matter of law under the standards of municipal liability established by this Court. Amanda has *not* misrepresented the record, directly or by implication, and submits that it is the

Town and the Seventh Circuit that have failed to construe the record in the light most favorable to Amanda, the party opposing summary judgment. The Town's contention that summary judgment was properly granted in its favor turns, moreover, on an extreme interpretation of the "plainly obvious" standard of municipal liability recently articulated by this Court in *Board of County Commissioners v. Brown*, ___ U.S. ___, 117 S. Ct. 1382, 137 L.Ed.2d 626 (1997). The legal theory advanced by the Town confirms the insurmountable obstacles faced by any party bringing a civil rights claim against a municipality under current law, and the pressing need for clarification or revision of the municipal liability standard by this Court.

II. LEGAL ANALYSIS

A. Amanda's Fact Statement was Entirely Accurate

The Town is mistaken in contending that Amanda concealed her state law claims against the Town. *See* Opposition at 1. Amanda specifically stated that her complaint raised "federal and state law claims," that the District Court "declined to exercise jurisdiction over Amanda's state law claims" and dismissed them "without prejudice," and that the Seventh Circuit's decision left her without "an effective *federal* remedy." *See* Petition at 2-3, 9 (emphasis added). As for the pending state law proceeding, the Court can rest assured that the Town has not conceded its liability and continues to contest vigorously any recovery by Amanda against it at all. As state law claims are governed by different rules of liability and offer distinct remedies from Section 1983, Amanda may yet receive *no* compensation and in any event will not secure in state court the full scope of relief available under federal law.

The Town falsely accuses Amanda of "glaring . . . misrepresentation" in suggesting that several instances of sexual misconduct by Officer Waymire were known to Town decisionmakers. *See* Opposition at 2, 4. On the face of her Petition, Amanda stated that the Seventh Circuit concluded the incidents were not known to Town policymakers, but pointed out that that view is inconsistent with testimony that Officer Waymire's conduct *was* common knowledge. *See* Petition at 5.

Leslie Huffman testified that, because of the Town's small size, if one person knew of something soon "everybody" would know, and in particular she was sure that Officer Waymire's conduct towards her was public knowledge well before his molestation of Amanda came to light. Several other witnesses corroborated the rapid flow of information and rumors within the small Town. As the Town itself admits, Chief Pulley advised Officer Waymire to inform his wife about the incidents with Evelyn Burger, "as Frankton was a small town." *See* Opposition at 2. *See also id.* at 3 (quoting Officer Waymire as stating "in a small community such as ours bad news spreads quickly").

This case came before the Seventh Circuit on review of a grant of summary judgment against Amanda. "On summary judgment, we must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520 (1991). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."). In this procedural posture, the Court is required to construe the record in the light most favorable to Amanda. It is for the jury to decide whether to favor Leslie's testimony that the incidents were common knowledge, supported by the consistent corroboration of multiple witnesses on the flow of information in a small town, over the self-serving claims of ignorance by Town officials accused of protecting a child molester. Amanda certainly did not misrepresent the record, in any event, by suggesting that the Seventh Circuit failed to credit an alternative interpretation of the evidence.

Although the Town contends, finally, that Amanda "grossly distorts" the circumstances surrounding the Town Board meeting in which Officer Waymire referred to rumors he was "messing around with thirteen-year-old girls" (*see* Opposition at 2-4), its description supports rather than contradicts Amanda's account. The Town denies the meeting was convened in response to the reports concerning Officer Waymire's conduct towards Evelyn and her thirteen-year-old daughter (*id.*

at 2), but immediately goes on to state that Officer Waymire requested the meeting after Chief Pulley warned him that his wife was likely to learn about those reports due to the Town's small size (*id.* at 2-3). The Town denies the Town Board had notice of any sexual misconduct by Officer Waymire (*id.* at 2), but admits that Officer Waymire stated during the meeting there were rumors he was "messing around with thirteen-year-old girls" (*id.*). The Town does not deny, moreover, that Chief Pulley and Town Board member Myron Waymire received a full account of the incidents directly from Evelyn even before the meeting.

As though it were a complete exoneration, the Town quotes highly suggestive remarks made by Officer Waymire at the Town Board meeting about Evelyn's thirteen-year-old daughter: "Now her daughter dates an 18 year old boy, so I assume she doesn't mind anything about (unintelligible) statutory rape. She certainly (unintelligible) that." *See* Opposition at 3. Far from putting to rest any suspicion of misconduct, Officer Waymire strongly implied that his actions were excusable because the girl was already sexually active. The suggestion that Evelyn did not really "mind" any "statutory rape" of her daughter should have heightened the concern of the Town Board, and can hardly be construed as lulling it into justifiable inaction.

In every particular, the facts recited by Amanda in the Petition are firmly grounded in the evidentiary record. By urging this Court, as it did the Seventh Circuit, to credit its interpretation of the record over Amanda's, the Town deviates from settled principles governing consideration of summary judgment motions.

B. The Town Confirms that Certiorari Should be Granted in Order to Clarify an "Elusive" Legal Standard and Prevent the Establishment of a "Rule" Against Municipal Liability

The thrust of the Town's legal analysis (*see* Opposition at 6-16) is that review by this Court is unnecessary because the Seventh Circuit correctly applied the "well settled" standards

of municipal liability under Section 1983. Telltale admissions in the Town's discussion, however, confirm that review by this Court is required to resolve persisting confusion regarding the application of an important federal statute and to rectify the precedential impact of a published Court of Appeals decision authored by an influential Chief Judge raising insurmountable barriers to civil rights claims against municipalities.

1. The standard for municipal liability under Section 1983 is far from "well settled"

The Town contradicts the central premise of its opposition to certiorari in this case – the contention that the Seventh Circuit applied "well settled" standards of municipal liability – by admitting that this Court's decisions have established an "elusive" standard that is difficult to apply. *See* Opposition at 13. The Town admits that "numerous federal courts have struggled" with that "elusive" standard, and that the Seventh Circuit decision in this case is a reflection on that "elusiveness." *Id.*

The Town confesses to the "elusiveness" of the municipal liability standard in the context of addressing the Seventh Circuit's doubt as to whether civil or criminal recklessness is required. *See* Opposition at 13. The suggestion that the distinction does not matter in this case because Amanda "loses" under either standard (*id.* at 14) is incorrect and misses the point. If, as the Seventh Circuit ultimately concluded (*see* Petition at 12a-14a), this Court's decisions indicate the tort standard of recklessness is sufficient to support liability, then the question is whether Officer Waymire represented an "obvious" danger, *not*, as the Town contends (*see* Opposition at 5), whether Town policymakers had actual knowledge of his misconduct. Amanda submits that the record in this case is more than sufficient to support a jury conclusion that the Town disregarded an "obvious" danger that Officer Waymire would violate the civil rights of a female citizen. *See* Petition at 18-21. The Seventh Circuit's confusion on the proper standard, in any event, points to the need for clarification by this Court on a subject of recurring perplexity in Section 1983 jurisprudence.

2. The Town misconstrues the *Brown* decision as adding nothing new to the law of municipal liability

In support of its contention that the Seventh Circuit simply applied "well settled" legal standards, the Town takes the position that this Court's recent decision in *Brown* did not in any way affect the existing standard of municipal liability. *See* Opposition at 7-8. The Town claims that "*Brown* does not alter the law of municipal liability under §1983" at all (*id.*), but rather "simply reinforces" the same standards "previously established" by this Court, and that *Brown* is nothing more than a "reaffirmation" of prior law (*id.* at 10-11).

The Town's attempt to downplay the significance of *Brown* is implausible and revealing. In general, this Court does not grant certiorari simply in order to issue opinions saying only that the law is still the same. By deciding *Brown*, this Court plainly perceived precedential significance in the case and intended the majority opinion to guide litigants and federal judges in future cases. *Brown*, a 5-4 decision, reflected a sharply divided Court raising widely divergent views on the subject of municipal liability. The four dissenting justices, certainly, regarded the majority opinion as a significant shift in the application of Section 1983 to municipalities. The impact on the Seventh Circuit's decision in this case is unmistakable, as Chief Judge Posner cited *Brown* more than half a dozen times as supporting the affirmance of summary judgment for the Town. *See* Petition at 9a, 12a-14a.

The Town misrepresents Amanda's position as being that *Brown* effectively overruled this Court's decisions in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978), and *City of Canton v. Harris*, 489 U.S. 378 (1989). *See* Opposition at 7-8. To the contrary, Amanda submits that it is the *Seventh Circuit's* decision in this case that *de facto* overrules *Monell* and *Canton*. As explained in the Petition, *Brown* is properly interpreted in the context of the two unique circumstances this Court emphasized as driving the decision there, neither of which pertain here: (1) the challenged conduct was a hiring decision rather than deficient training or supervision;

and (2) the claim was based on an isolated instance rather than a pattern of misconduct. *See* Petition at 15-18. The Seventh Circuit nevertheless applied *Brown* without addressing either of the two critical distinctions, creating a conflict with the *Canton* standard applicable to training and supervision cases. While *Brown* safeguards the *Monell* principle barring vicarious liability, the Seventh Circuit's decision here threatens the viability of the *Monell* holding that municipalities *are* subject to liability under Section 1983 upon an adequate showing of fault.

The Town, protesting too much that *Brown* is nothing but a reiteration of "well settled" principles, apparently recognizes that the state of the law in the wake of *Brown* is decidedly *un*settled and warrants a clarifying decision by this Court. The Seventh Circuit's application of *Brown* here realizes the very danger that Justice Souter predicted in his dissenting opinion in *Brown*, that the "newly-demanding" standard would translate into "a virtually categorical impossibility" of establishing municipal fault. *See* 117 S. Ct. at 1396.

3. The Seventh Circuit's extreme interpretation of the newly articulated "plainly obvious" standard would effectively grant municipalities civil rights immunity

The Town defends the Seventh Circuit's reading of the "plainly obvious" language in *Brown* as precluding liability unless, in essence, Officer Waymire formally announced to Town officials that he was planning to molest underaged girls. *See* Opposition at 5, 9-10. A policy of sexual tolerance and a custom of protecting officers accused of misconduct, apparently, is not enough, even though police officers routinely detain, search and arrest females in the course of their duties and are in a unique position to coerce sexual favors. Amanda may be a female, and there may have been an obvious risk that females would be sexually abused, but Town officials, supposedly, were not aware that Officer Waymire was likely to molest a *minor* female. The Town offered no training and had no established procedures to protect the rights of juvenile females taken into custody by police officers, but its decision-makers, theoretically, did not consciously anticipate that such

girls would be *sexually* mistreated by officers. Officer Waymire made a lurid invitation to one thirteen-year-old, admitted there were rumors he was "messing around with thirteen-year-old girls" and had frequent unsupervised contact with Amanda, but, claims the Town, never openly admitted he was actually *molesting* any adolescent girls.

Under any set of facts, there will be some aspect of the particular violation that municipal policymakers can claim they did not contemplate, regardless of their culpability in fostering the conditions that led to it. The Town's chain of rationalization is apparent: child molestation is a horrible crime, dignified Town officials would never condone such a terrible thing, therefore they could not have known it was happening and hence should not be held responsible. The same reasoning, of course, would hold true with respect to any number of brutal and reprehensible abuses of official power by police officers and other municipal employees, but to insulate the municipality from liability is to promote a lack of accountability and thereby perpetuate the kinds of civil rights violations that Section 1983 was designed to remedy.

The Town argues that Amanda advocates a simple negligence standard by proposing a test of reasonable foreseeability (*see* Opposition at 15-16), but it is the Town that confuses the standard of liability with the test for causation. *See, e.g., Collins v. City of Harker Heights*, 503 U.S. 115, 120 (1992) (framing two-step analysis to determine municipal liability: "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation"). The municipality's culpability is measured by its "deliberate indifference" (*see Canton*, 489 U.S. at 388), but it is a separate question whether the violation was proximately caused by that indifference (*id.* at 390-91). Here, Amanda submits the record is more than sufficient to support a jury finding of an adequate causal link between Officer Waymire's actions and the Town's defective policies, procedures, customs, training and supervision. *See* Petition at 18-21.

Violence, intimidation and oppression at the hands of those to whom local governments issue firearms and entrust with law enforcement authority is a serious societal problem

going far beyond the immediate interests of the molested girl in this case. The same rule of law that would bar recovery of damages from municipalities in cases like this would also, of course, prohibit use of a federal court's injunctive powers to correct conditions shown to be conducive to civil rights violations. Suits limited in scope to the personal liability of individuals offer little opportunity to address the institutional origins of unconstitutional conduct. This Court should hesitate and consider carefully before endorsing a truncation of the authority of the federal judiciary to remedy constitutional violations in this context.

4. The Town correctly perceives that the Seventh Circuit's decision establishes a "rule" against municipal liability

The Town boldly contends: "Municipal liability under §1983 should be the exception to the rule; not the rule." *See* Opposition at 16. The notion that municipalities cannot be subjected to Section 1983 liability except in the most extraordinary circumstances not present even in the compelling facts of this case, indeed not even raising a jury issue in this context, clearly *does* amount to the establishment of a *de facto* "rule" against municipal liability.

The decisions of this Court at one time did support the view that there was a rule against municipal liability, on the theory that municipalities were not "persons" within the meaning of Section 1983. *See Monroe v. Pape*, 365 U.S. 167, 187-92 (1961). That rationale, however, was overruled by *Monell*, in which this Court held that municipalities *are* "persons" subject to liability under Section 1983. *See* 436 U.S. at 689-94. *Monell* established a rule against *vicarious* liability on the part of municipalities (*id.*), but *Monell* and its progeny have *not* established any rule against liability based on municipal fault, and this Court has not suggested that such liability has disfavored status or should be applied only grudgingly and with great reluctance. Given that municipalities are "persons" within the meaning of Section 1983, a rule against liability or a special

requirement that municipalities be held liable only in exceptional circumstances would be inconsistent with the plain language of the statute: "[e]very person" who deprives a citizen of civil rights under color of state law "shall be liable" in a civil action. *See* 42 U.S.C. §1983.

While the Town sees the law as having come full circle back to the rule in *Monroe* that municipalities cannot be held liable under Section 1983, at least absent extraordinary circumstances unlikely ever to be presented, Amanda urges a reaffirmation of the *Monell* principle that municipalities *are* subject to civil rights liability under federal law. The erosion of that holding in *Monell* and the reemergence of *Monroe* as at least a rule of thumb is now squarely before the Court in this case. If the state of the law, as exemplified by the Seventh Circuit's decision, indeed calls the viability of *Monell* into question, Amanda respectfully submits, in keeping with the dissenting opinions in *Brown*, that it is the prohibition against vicarious liability that should be reconsidered rather than the inclusion of municipalities within the scope of Section 1983.

III. CONCLUSION

This case squarely presents unsettled legal issues concerning the application of Section 1983 to municipalities, and does so in a compelling fact setting in which the equities of the case are commensurate with the importance of the issues. Amanda respectfully prays that this Court grant the Petition and agree to hear her case.

Respectfully submitted,

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